EXHIBIT II

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 18-23538-rdd

- -x

In the Matter of:

SEARS HOLDINGS CORPORATION,

Debtors.

- -x
Vir VENTURES, ET AL.,

Plaintiffs,

VS. Adv. No. 19-08700-RDD

SEARS HOLDINGS CORPORATION,

Defendant.
- x

United States Bankruptcy Court
300 Quarropas Street, Room 248
White Plains, New York

February 24, 2020

10:16 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

Notice of Agenda of Matters Scheduled for Hearing on February 24, 2020 at 10:00 a.m.

HEARING RE: Adversary proceeding: 19-08700-rdd, Vir Ventures, Inc., et al v Sears Holdings Corporation, Pre-trial Conference.

HEARING RE: Adversary proceeding: 19-08700-rdd, Vir Ventures, Inc., et al v Sears Holdings Corporation, Motion to Adjourn Adversary Proceeding or for an Extension of Time to Answer or Otherwise Respond to Plaintiffs' Adversary Complaint (related Document(s) 5).

HEARING RE: Administrative Claims Consent Program.

HEARING RE: Motion to Allow Relief from Amended Stipulated Protective Order fled by Sonia E. Colon on behalf of Santa Rosa Mall, LLC (ECF 7210).

HEARING RE: Motion to Approve/Second Motion for Orders Establishing Streamlined Procedures Governing Adversary Proceedings Brought by the Debtors Pursuant to Sections 502, 547, 548 and 550 of the Bankruptcy Code (ECF 7204).

HEARING RE: Motion to Authorize/Motion of Debtors Requesting Release of Adequate Assurance Deposit Amounts Pursuant to the Adequate Assurance Procedures (ECF 7290).

Transcribed by: Pamela Skaw, Nicole Yawn and Jamie Gallagher

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ALSO PRESENT:
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CARLOS RIOS GAUTIER, ESQ. (TELEPHONIC)

P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Please be seated. Okay. Good morning. In re Sears Holdings Corporation, et al.

MS. CROZIER: Good morning, Your Honor.

The first item on the agenda is the initial pre-trial conference in Vir Ventures, et al. against Sears Holdings Corporation, number 19-08700.

THE COURT: Okay.

MS. CROZIER: Jennifer --

THE COURT: And related to that is Sears Holdings Corporation's motion to adjourn or alternative for an extension of time to answer.

So why don't we take both of those matters together?

MS. CROZIER: Thank you, Your Honor.

Jennifer Crozier, Weil Gotshal & Manges for the Debtors.

Your Honor, the Debtors move to adjourn or stay this adversary proceeding or, in the alternative, for an extension of time to respond to Plaintiffs' complaint.

The Plaintiffs are litigating their administrative expense claims in three separate contexts forcing the Debtors to contend against those claims on three separate fronts and expend the limited resources of the estate in so

doing to the detriment of the estate's other creditors.

The Plaintiffs, on November 12, 2019, filed their adversary complaint asserting several claims based, in pertinent part, on allegations that the Debtors breached certain Sears' market place agreement.

The complaint seeks $790,000 approximately with respect to pre-petition amounts and $95,000 approximately with respect to post-petition amounts.

Now, before they filed their adversary complaint, Plaintiffs filed six proofs of claim. In August 2019, the Debtors objected to these claims seeking to reclassify those general unsecured claims.

THE COURT: Because they were filed as 503(b)(9)?

MS. CROZIER: Correct.

THE COURT: Claims.

MS. CROZIER: The Plaintiffs responded and those claims are now the subject of a pending contested matter.

And then six days after they filed their adversary complaint, Plaintiffs affirmatively opted in to the administrative expense claims consent program by submitting two opt-in ballots; the first on behalf of Plaintiff AMI for approximately $700,000. That covered both pre and post-petition amounts. And the second Plaintiff, Vir Ventures, for approximately $185,000; again covering both pre and post-petition amounts.

So, Your Honor, the Debtors ask this Court to adjourn this proceeding until Plaintiffs' administrative expense claims have been resolved in connection with the pending contested matter and the administrative expense claims consent program. These are the contexts approved by this Court in the confirmation order and the omnibus objection procedures for the orderly and efficient resolution of claimants' administrative expense claims.

This adversary proceeding is decidedly not the proper context in which to litigate Plaintiffs' administrative expense claims.

First, the pre-petition amounts the Plaintiffs are seeking amount to a claim for money damages based on pre-petition conduct which is not properly brought as an adversary proceeding under the law and that's In Re Ephedra Products Liability Litigation, Southern District of New York, 2005.

Second, Your Honor, the Debtors' position is that Plaintiffs waived their right to recover on their administrative expense claims in the adversary context when they opted-in, affirmatively opted-in, to the administrative expense claims consent program. But, at the very least, their participation in that program moots their claim for relief as to post-petition amounts in connection with this adversary proceeding.

At bottom, Your Honor, Plaintiffs' adversary proceeding amounts to an end run around the orderly and efficient procedures that this Court approved to ensure that all creditors of the estate are treated fairly and equitably.

Now Plaintiffs make a few arguments in their opposition to the Debtors' motion to adjourn that I would like to briefly address.

First, Plaintiffs claim that this adversary proceeding is not simply a claim for money damages based on pre-petition conduct. Plaintiffs argue we've asserted claims for equitable relief as well.

First of all, for reasons that the Debtors would make clear in a motion to dismiss should it come to that, Your Honor, Plaintiffs have not and cannot state a claim for equitable relief here.

But even if that were not the case, this Court held in In Re Johns Manville 1985 that if the claim -- if the equitable claim is one that can be reduced to a money judgment, that is -- is effectively a claim for money damages masquerading as equitable relief, it must be asserted in connection with the orderly claims process.

THE COURT: But that's a -- that's true as a general proposition but there are two claims in this complaint that, to me, do seek relief that would be proper

as an adversary proceeding.

First, the declaration or recognition of an express trust and, second, the imposition of a constructive trust. That's not something you would normally litigate, I believe, in a claim objection.

It's affirmative relief that's being sought separate and apart from a claim. It's basically saying this isn't property of the estate.

MS. CROZIER: Right. So a couple of things on that, Your Honor.

The Debtors are prepared to litigate those claims for equitable relief in connection with a motion to dismiss if need be. But we would submit that addressing Plaintiffs' administrative expense claims -- Plaintiff submitted -- each Plaintiff submitted one ballot and that ballot covers both pre and post-petition. Now those ballots include the amounts Plaintiffs are seeking as equitable relief.

And so we would submit that because these are orderly and -- an orderly and efficient manner of addressing Plaintiffs' claims that we should adjourn this adversary proceeding until those claims are resolved and then determine whether it's appropriate to move forward on those claims. That's the first argument.

The second argument is, again an argument that we would anticipate making in a motion to dismiss, Plaintiffs'

haven't and can't state a claim for breach of express trust. It's not enough to simply say in -- under the law, it's not enough to simply say in a contract --

THE COURT: But that may be the case.

MS. CROZIER: Okay.

THE COURT: But why wouldn't the right thing to do here be to consolidate those two claims under Rule 7042 with the pending claim objection so it's all dealt with at once and then set a deadline to answer or otherwise move on just those two?

I mean, the -- I agree with you on the other claims. They're -- it's just another way of saying we have a claim as opposed to a separate claim for relief to establish a trust either actual or constructive.

MS. CROZIER: So, just so I understand what Your Honor is proposing, you would propose to consolidate the claims for equitable relief with the pending contested matter?

THE COURT: The two -- well, I'm not sure -- I want to be specific. The claim for express trust and the claim for a constructive trust.

The other claims, the other causes of action, to me, are already being dealt with in the claims objection process and properly so. They're not -- they are not the proper subject of the Rule 7001 adversary proceeding.

MS. CROZIER: So I would defer to my colleague in bankruptcy concerning how to consolidating these claims with the pending contested matter.

THE COURT: Okay.

MR. FAIL: Good morning, Your Honor.

Garrett Fail of Weil Gotshal & Manges, if I may address the Court on this issue.

THE COURT: Right.

MS. FAIL: So the objections that are filed with respect to the current claims of the administrative and the pre-petition portions are a part of omnibus objections.

The Debtors adjourned that omnibus objection. We filed the thirteenth omnibus objection to a hundred other claims with the same issues so that they could all be addressed. There was a reason that we've consistently, you know, efficiently moved these cases forward and I'll present more of an update on the claims later.

So I don't think it necessarily makes sense to combine them.

Also Your Honor will recall you set up claims objections procedures whereby legal issues would be determined first before factual issues.

So, while we agree, and I think Ms. Crozier suggested and our pleadings suggested, that this be handled in connection with the claims process and without an

adversary proceedings, the additional time delay and cost of an adversary. I think the objections can be dealt with separately. They're on track. They'll go forward. That issue will be resolved.

The remaining claims can be dismissed either, in our opinion, in a motion or in the adversary. It doesn't -- we're just trying to do it efficiently.

But I don't think it makes sense to delay or combine this new equitable relief with the question of whether they're entitled to a claim.

They filed claims and they submitted ballots. They've asked for a claim. Now they're asking for equitable relief on top.

I think we should address the claim first and equitable relief afterwards and I think it's an admission essentially when they filed two claims, they submitted ballots. They have claims.

THE COURT: Well are you saying that they're barred from asserting a trust?

MR. FAIL: We've asked for additional time to respond. And so if we have -- if they continue to, you know, prosecute the adversary after -- they might win, right?

We -- the objection is pending. Your Honor hasn't decided whether or not they have an administrative claim.

If they have a claim, this adversary's moot. They get a hundred cents. They're not going to get additional monies. They're looking for the same amount.

THE COURT: Well it's the other way around, too, right? If they have a trust, it -- yeah, the claim objection is moot.

MR. FAIL: Sure. But one's already been pending and subject to -- so it's been responded to and, you know, it --

THE COURT: I just don't see why it's that big a deal to include a motion to dismiss or a motion for judgment on the pleadings on the two trust claims as part of your objection to the claim.

MR. FAIL: Well, we can add another objection, Your Honor. We'll just need a little bit more time to do it and we'll file a separate objection.

But the one that's currently pending was with respect to the same request for the same amounts but in a different form. So we didn't have that pending when we set an objection.

THE COURT: I understand that. And so it -- I think the need to extend the time to answer and to schedule it in coordination with or combine it.

UNIDENTIFIED SPEAKER: Your Honor, if I may. I am here. I'm counsel for --

THE COURT: Okay. I want to get the Debtors' view first under Rule 7042, it makes sense. And I appreciate that there are a lot of common issues, common to a lot of claimants, generally.

But, just in terms of efficiently dealing with these particular claims --

MR. FAIL: We wouldn't want to delay, Your Honor, everybody else. I think Your Honor --

THE COURT: No.

MR. FAIL: -- has asked us to move forward.

THE COURT: I agree with you.

MR. FAIL: We'll move forward to dismiss these. We think that they're frivolous at best.

THE COURT: Okay. All right. Anything else?

MS. CROZIER: So there were just a couple of other things that I'd like to address, Your Honor.

With respect to the opposition to our motion to adjourn, Plaintiffs' counsel indicated that there's no cause for delay here because heretofore the settlement process has been minimal.

Counsel for the Debtors have engaged in several conversations and substantial correspondence with Plaintiffs in an effort to reach an amicable and expeditious resolution of their claims and to avoid depleting the pool of resources available to the estate's other creditors to no avail

because here we are. For example, Your Honor, Plaintiffs, on Friday, served us with an improper 30(b)(6) notice of deposition delineating no fewer than 24 topics; improper, of course, because the parties haven't met and conferred yet pursuant to Rule 26(f).

Second, Plaintiffs filed, last night at 12:27 a.m. I think, a motion to set aside $885,000, a reserve from the second distribution, claiming that the Debtors' negotiations thus far have been "our way or the highway" and if what Plaintiffs' counsel means by that is that Debtors have expressed an unwillingness to pay Plaintiffs any more than they are owed under the law and any more than the orderly procedures established by this Court or approved by this Court for the settlement of their claims, then I suppose, in that case, Plaintiff is correct.

But we do submit, Your Honor, that at least with respect to the claims that are without question not properly brought in connection with an adversary proceeding (indiscernible) adjourn this and give the Debtors substantially more time to respond.

THE COURT: Okay. I'm confused though. I -- my order confirming the plan contemplated a report and I believe a motion or an opportunity to object at least if there was going to be any distribution, right?

MR. FAIL: No, Your Honor, I don't believe that

there was. I think last time, you may remember, pleadings were filed because we announced that we were making a distribution and then the rest ensued.

But I don't believe that there is a -- we don't need to make another motion. I think that there are minimum conditions that need to be satisfied.

THE COURT: Right. I don't think that's right. I think there's some notice requirement.

MR. FAIL: Sure. Notice. But not a -- no hearing.

THE COURT: No, a notice requirement.

MR. FAIL: Yeah.

THE COURT: And people can object.

MR. FAIL: Yeah. We'll file a notices in advance.

THE COURT: So is this -- was this pleading filed last night in response to a notice?

MR. FAIL: Not at all, Your Honor.

THE COURT: So why are we wasting time on this? It's a total waste of time. Disregard that pleading. It should be withdrawn. Okay.

MS. CROZIER: That's all I have, Your Honor. Thank you.

THE COURT: All right.

MS. PAYMER: May I, Your Honor?

THE COURT: Yes.

MS. PAYMER: Your Honor, my name is

Selen Mazer Paymer (ph). I'm here on behalf of Vir Ventures and AMI Ventures.

Your Honor, we did, in fact, file a motion last night.

Our concern is, Your Honor, that we're not being given the opportunity to be heard and to have this Court determine the merits of our claims objection, our response to the second omnibus claims objection as well as our adversary proceeding, Your Honor. I --

THE COURT: But motion is to set aside money?

MS. PAYMER: It is, Your Honor. We're concerned --

THE COURT: Well -- but what's the -- why? What the context?

MS. PAYMER: We're concerned, Your Honor. We feel as though that the Debtors have not complied with the procedures set forth in the confirmation order with respect to the administrative claims program --

THE COURT: Are they making distributions?

MS. PAYMER: Your Honor, they did make an initial distribution. And --

THE COURT: After a notice was given, right?

MS. PAYMER: After a notice was given, Your Honor.

THE COURT: And the order requires notice to be given with respect to future distributions.

MS. PAYMER: That's correct, Your Honor.

THE COURT: And then someone can respond and say, no, this is premature, right?

So why are we creating additional litigation before that process happens?

MS. PAYMER: Your Honor, my concern in conjunction with their motion to continue the adversary proceeding is that they're -- the Debtors are trying to run out the clock on my clients' claims and we're now missing the first distribution and the second distribution, Your Honor.

With respect to the first one, I know the confirmation order says that there should be an expedited reconciliation process.

And my clients are frustrated here because we've been trying to resolve this matter on an amicable basis for months, many months, Your Honor.

And we believe that, particularly with respect to the adversary proceeding, Your Honor, that it's not just an administrative claims issue. There are also taxes that were not paid.

There may be other individuals involved that we can name in this litigation that --

THE COURT: Wait, wait. Let's just stop.

MS. PAYMER: -- would be responsible.

THE COURT: Let's stop for a moment. Let's go

through this complaint and talk about the Bankruptcy Rules and the Bankruptcy Code and what can and cannot be brought; all right?

MS. PAYMER: Yes, Your Honor.

THE COURT: As I understand it, you have a pre-petition claim that's been objected to. That pre-petition claim asserts an administrative expense right under Section 503(b)(9), correct?

MS. PAYMER: Correct, Your Honor.

THE COURT: And that's the subject of an -- a long pending objection.

MS. PAYMER: Correct, Your Honor.

THE COURT: You also have an administrative expense.

MS. PAYMER: Yes, Your Honor.

THE COURT: You assert those same claims in this adversary proceeding. In fact, you incorporate your pleadings into the adversary proceeding.

MS. PAYMER: Yes, Your Honor.

THE COURT: Where on Earth is that based on Rule 7001 as opposed to the claims process?

Are we supposed to decide these things three times?

MS. PAYMER: No, Your Honor. We're just asking for one --

THE COURT: All right.

MS. PAYMER: -- (indiscernible) objection.

THE COURT: So that is -- that should just be dismissed. It's not proper in this context as an adversary proceeding. It's bankruptcy 101. It is not proper to keep litigating separate -- the same matter in separate pleadings. It's a waste of time and money.

Congress got it right in the Bankruptcy Rules. It's not covered in Rule 7001. That is not a proceeding to recover money. It's a claim against the Debtor. It's already be asserted.

Then you say there may be third parties involved through alter ego or piercing. And is that somehow a claim? Are you asserting that in this adversary proceeding? You're not, right?

MS. PAYMER: Not against the Debtors' estate, Your Honor. Against other individuals.

THE COURT: You're not asserting it in the adversary proceeding, right, because the -- those individuals are not named in the complaint.

MS. PAYMER: Not yet, Your Honor. We haven't engaged in discovery for us to figure out who that would actually be.

THE COURT: So that's not part of this adversary proceeding either. So you shouldn't be arguing that to me today either.

In fact, that argues to delay this.

There is also a serious issue as to your clients' standing and/or whether it's barred by prior orders of the Court.

So I would hope you would think very carefully before pursuing that.

Among other things, a general alter ego or veil piercing argument, it is well established in the Second Circuit is a violation of a stay if it's brought just willy nilly without stay relief.

MS. PAYMER: Uh-huh.

THE COURT: But it's not part of this complaint anyway.

So the only thing, to me, that looks like something new that might be covered by Bankruptcy Rule 7001 as an adversary proceeding are the two trust claims.

Is there anything else?

MS. PAYMER: No, Your Honor. That's correct.

THE COURT: So that's asserting an interest improperly as opposed to a claim generally against the Debtor.

MS. PAYMER: Correct, Your Honor.

THE COURT: All right. So if one were to actually deal with this complaint, one would have to sift through it and exclude all of this.

And why should a debtor be forced to spend the money to move to dismiss a complaint that, on its face, just doesn't make any sense procedurally?

You're throwing out a procedural gauntlet that doesn't make any sense except for these two claims.

MS. PAYMER: Your Honor, I think -- I can confer with Debtors' counsel with respect to the claims that we should -- are outstanding and should remain. I think we can resolve a motion to dismiss.

THE COURT: Okay.

MS. PAYMER: I'm just concerned my client is here today. We just want to know when we can actually have this Court determine any of these issues, the legal issues or the factual issues.

THE COURT: All right. That's a fair point. But I think we're going to get to that later in today's calendar which is the schedule for dealing with administrative expenses.

MS. PAYMER: Thank you, Your Honor.

THE COURT: Okay. So it seems to me, subject to hearing the general report on administrative expenses, that causes of action one, three, which is unjust enrichment, implied contract; one being breach of contract -- well, conversion depends on counts two and four. But to the extent it depends on some other count besides two and four,

it should be dismissed. Those should be dismissed.

Two and four which are the trust claims dismissed without prejudice to the claims process. It's already been underway and underway for months.

Two and four should be consolidated with the claims process under Bankruptcy Rule 7042 which is specifically contemplated by the advisory committee commentary to the 2007 Amendments to Rule 3007 which deal with what should be dealt within a claim objection and what should be dealt within an adversary proceeding.

The rules committee and then through that -- then Congress recognized that there are times when a claim objection may also implicate matters that are dealt within an -- properly and necessarily in an adversary proceeding which would include the cause of action for the imposition of a trust.

And the rules committee said if a claim objection is filed separately from a related adversary proceeding, the court may consolidate the objection with the adversary proceeding under Rule 7042 and that's what should happen here.

Now as far as what goes first, I -- we should talk about that as part of the pre-trial. But given how the complaint is -- has been whittled down today, there definitely should be an extension of the time to answer or

otherwise move.

But we should now deal with, you know, when that should be. So why don't we address that in the context of a pre-trial conference which I gather pertains not only to this litigation but the timing of resolving common issues in a lot of different claim objections.

I want to know which counsel for the Debtor wants to address that?

MR. FAIL: Your Honor, Garrett Fail from Weil Gotshal.

It doesn't make sense to give the overall report right now and see where things are?

THE COURT: Okay.

MR. FAIL: I think it'll be brief.

MS. CROZIER: Thank you, Your Honor.

THE COURT: Okay.

(Pause)

MR. FAIL: Good morning, again, Your Honor.

Garrett Fail of Weil Gotshal & Manges, for the Debtors.

Your Honor, following entry of the confirmation order on October 15th, the Debtors sent notices to approximately 11,274 parties at 16,614 addresses.

Claimants were divided into three categories, as you'll remember. Opt-in, settled admin claims were those

who opted-in to the settlement and settled in time to be eligible for an initial distribution of $21 million.

Non-opt-out settled admin claims would be those people who did not opt-in but also did not opt-out plus parties that did opt-in but whose claims were not reconciled in time for the initial distribution.

The third category were those who opted-out and who could be addressed and reconciled and paid after the effective date of the Plan.

So addressing the opt-in settled admin claim category first, Your Honor.

The Debtors received 1206 ballots. After reviewing, they identified and deducted approximately 258 duplicate claims and 120 claims or ballots that would be addressed and should be addressed in separate processes including professionals that would be paid out of a carve-out. Utilities for whom there are separate deposit accounts to be paid for and taxing authorities.

That left 828 ballots to review. The Debtors reconciled and agreed with 359 of them or 43 percent of them for a total of $73.2 million that shared in the $21 million and they got 28.7 percent in the first distribution.

Ninety-eight percent of the payments to those people cleared. So it was successful. There are roughly 13 checks out of 308 outstanding that haven't cashed.

Moving on to the second category and the work that's been done subsequent --

THE COURT: Can I interrupt you?

MR. FAIL: Of course, Your Honor.

THE COURT: AMI and Vir were in the opt-in category but they were not reconciled?

MR. FAIL: Correct, Your Honor.

THE COURT: Okay.

MR. FAIL: So they rolled over and rather than being capped at 75 percent, their cap goes up and they get to recover up to 80 percent along with the other parties in the second and subsequent distributions.

THE COURT: Right.

MR. FAIL: So, in the second category, where we currently are, this includes as -- this included the opt-in ballots that have not been reconciled plus additional motions and proofs of claim that asserted 503(b)(9) claims plus motions that are filed on the docket and proofs of claims that were filed asserting 503(b)(1) claims.

The Debtors filed -- and plus it also included the Debtors' books and records for unpaid, post-petition 503(b)(1). That's the population that we were tasked to deal with.

THE COURT: Unless someone opted-out.

MR. FAIL: Correct, Your Honor.

THE COURT: Right. Okay.

MR. FAIL: The Debtors filed ten omnibus objections to more than 1400 claims. I think roughly 1407, that had asserted approximately $702 million in administrative and priority claims.

Of these, all but approximately 48, which is 48 claims for fewer than 30 creditors, have been resolved. So we resolved over 96 percent of the claims to which we objected without a contested hearing which I think is impressive.

In terms of the dollars, we resolved, without a contested hearing, more than 80 -- 98 percent in amount subject to the first through tenth objections and we're working with some of the --

THE COURT: I'm sorry. Subject to that what?

MR. FAIL: First through tenth omnibus objections.

THE COURT: Right. Pursuant to --

MR. FAIL: Those are the ones that --

THE COURT: -- those.

MR. FAIL: Pursuant to those --

THE COURT: Right.

MR. FAIL: -- that the Court either settled, entered orders, we settled or we withdrew. But we have reconciled without a --

THE COURT: As part of that process.

MR. FAIL: As part of that process.

THE COURT: Okay.

MR. FAIL: And through the administrative consent process that ensued subsequently.

THE COURT: Okay.

MR. FAIL: My point, Your Honor, was only that we didn't burden the Court extensively with contested matters.

And we're working with some of the additional remaining 48 claims on a consensual basis waiting for, for example, determination as to whether certain contracts will be assumed or assigned to Transform.

So there's reasons that some -- consensual reasons, why many of the objections have been carried, rather than to withdraw and refile.

THE COURT: Okay.

MR. FAIL: Currently, outstanding, there are approximately 1,936 in number, approximately $332 million in asserted amounts outstanding. Still significant. But, of these, Your Honor, the debtors have reconciled and can agree to approximately 992 of them, more than 51 percent, leaving 944 disputed. The debtors filed the eleventh, twelfth, and thirteenth objections to approximately 278 creditors and/or ballots. That's approximately 30 percent of the 944.

The objection deadlines for these will lapse on March 3rd and March 10, respectively, so coming up in

advance of the next hearing, Your Honor.

THE COURT: Which is March 25th, I think.

MR. FAIL: I believe. If that's the Monday, I think we changed it to accommodate Your Honor's court calendar.

THE COURT: Okay.

MR. FAIL: I think it was the 27th, and now, it's the 25th.

THE COURT: Well, maybe it's the 23rd. That's the Monday. It's the 23rd.

MR. FAIL: I believe it's the 23rd now, Your Honor.

THE COURT: okay.

MR. FAIL: But upcoming and the objection deadline will occur before then, and we're -- we'll be, you know, consistent with our normal practice, submitting certificates of no objection to whittle down and avoid the burden on the Court and all the parties and interests.

So, Your Honor, that -- that leaves us with approximately 668 disputed. Still significant, but a lot smaller.

THE COURT: And I'm sorry. This is in -- just in Category 2 or in both categories?

MR. FAIL: Category 2, Your Honor.

THE COURT: Okay.

MR. FAIL: category 3 is not significant, in terms of number.

THE COURT: Okay.

MR. FAIL: But also, in terms of our mandate for what, you know, we were tasked to focus on. So this is what I'm reporting on, Your Honor.

Of the 668, approximately 159 of these are real estate-related. The reason I say that is because the debtors are working with Transform to ensure that amounts for which Transform is responsible are paid by Transform, including cure amounts, and reconciling additional asserted amounts for the various landlords. So some of them may have been paid. Some of them will be paid. That's -- that's 159 of the 168.

So, setting those aside for the moment, there's 507 others that are disputed that we're working towards resolving. The debtors have sent out more than 365 individual emails to these parties. The debtors believe that, for the remaining -- that for 61 of the remaining creditors or ballots, they relate to contracts that may have been assumed or were assumed by Transformed and they, therefore, no longer have claims against the debtors. There may be nothing left to do with those, so that may be 61 that are resolved completed. The debtors are researching approximately 60 creditors to find ballot contact

information for those, leaving 23 that haven't been contacted with a formal email recently, and those will go out by the end of the week.

The emails that we sent out informed parties that, if they don't respond, the debtors will be pursuing objections to the claims, and the debtors will do so where there's no response or the response does not lead to information sufficient to reconcile. Obviously, there has been a lot of work that's gone into this process. The debtors have been efficient with their use of judicial and estate resources, and we hope to be able to continue that efficiency while continuing to make process -- progress, Your Honor.

The goal of the debtors is to reduce the number and the amount of disputed claims in advance of the next distribution, in order to reduce the need for reserves and to maximize the amount that's distributable, ultimately. While the debtors have reconciled amounts that they owe, they've also sent demand letters and commenced hundreds of preference actions. There is likely overlap, and the debtors reserve all rights to pursue affirmative recoveries.

The debtors are still collecting information from Transform and from creditors, but, given the Court's direction to expedite claims reconciliation, in large part, the debtors have not held up reconciling amounts owed, in

order to get preferences -- preference recoveries net. To further streamline the process and expedite and maximize recoveries, the debtors will continue -- will consider the concept of a convenience, to make lump-sum, one-time final payments, rather than multiple de minimus payments, for small claims that have been allowed, to reduce administrative costs.

Your Honor, that -- that brings us up to date and to where we are. The next hearing is, as you said, at the end of March. We expect to go forward with a number of objections, if -- if we have to. We -- we found that the adjournments have led, as the numbers indicate -- they speak for themselves. The adjournments have worked. The debtors have worked consensually, and we've avoided the time and expense of contested matters. We're currently scheduled to go forward, and we will, if we have to, on any remaining items.

THE COURT: Well, I -- I was under the impression, though, that, in -- in saying that, the debtors believed that there might well be common issues that would need -- it would make sense to give the parties who have not settled an opportunity to be heard on, so that -- well, everyone believes they're the best lawyer. So, you know, the lawyer who isn't the best lawyer gets heard first and loses, and then they're stuck. So when do you contemplate that

happening, that type of process?

MR. FAIL: They are currently teed -- the two issues that were raised with common -- with common issues were the world imports issue. There are only two attorneys And maybe three -- two or three -- three attorneys with four claims, out of the many, many that were disputed, that seek to go forward at a hearing.

THE COURT: Okay.

MR. FAIL: Based on the first. There's another round of objections, and there's none -- we filed another objection. There have been no responses to date. So we'll see what's required, and we may ask the Court for flexibility. We may go forward, but that's currently teed up for March.

The second issue was what has been referred to this morning as the marketplace vendors or otherwise referred to as drop ship, and we filed, as I mentioned, another objection to 100 claims of a similar issue. It's teed up for March, if people want to go forward. We'll be prepared to do that, too.

THE COURT: All right.

MR. FAIL: Your Honor, I would just say that, with respect to disputed matters that go forward before judgment, the appellate process takes time, and we don't -- we, the debtors, don't believe that, you know, litigation is going

to yield a faster recovery to parties. So I'll say it on the record again.

THE COURT: That may well be the case.

MR. FAIL: But it -- we're prepared to go forward.

THE COURT: And it may be, based on -- and -- and that's confirmed by what you have been reporting to me just now, that the claimants, by and large, believe that, too. I just want to get a sense of the timing here, and it's either the next hearing or maybe the one after that, where those issues might be teed up.

MR. FAIL: That's right, Your Honor, because although we have attempted to get this all done, in advance of the next hearing, the -- between the objection deadline and the hearing, parties may want time to enter into settlement negotiations. So --

THE COURT: Right, and I'm not going to stand -- I'm not going to stand in the way of that, because that's parties controlling their own -- their own destiny.

So, moving aside to Vir and AMI, it doesn't appear to me that their issues are really subsumed by those two joint issues. It's really a --

MR. FAIL: They're not, Your Honor.

THE COURT: -- a separate legal theory.

MR. FAIL: Other parties can assert it. Their contracts aren't unique, but no one else has, in part,

because I'm sure, as Ms. Crozier will tell you, they're barred. When you have a contract, you can't have quasi-contract relief, unless amongst other things, but --

THE COURT: Well, I -- but I -- but I -- what I'm saying is I also -- I don't know whether you have other parties like Vir and AMI that are really online suppliers with that type of contractual relationship.

MR. FAIL: Hundreds, yeah.

THE COURT: You do?

MR. FAIL: Yes.

THE COURT: But -- but others have not raised these issues?

MR. FAIL: I think there was -- there may be one or two in the -- in the second omnibus objection that responded asserting it, in response. I'd have to go back and look, but in general, there have been no adversary proceedings commenced to declare that it's not our -- that it's not property of the debtors' estate. So --

THE COURT: Okay. So --

MR. FAIL: Your Honor, this is a drop ship issue. They're -- all the drop ship parties have these -- have the same contract. They're referred to as marketplace vendors.

THE COURT: Right. But is that an issue for Vir and AMI? I guess it is.

MR. FAIL: That's what -- that's what the pending

objection is. So they're one of the --

THE COURT: All right.

MR. FAIL: -- parties.

THE COURT: So that is -- that is a common issue?

MR. FAIL: The drop ship is, yes.

THE COURT: Right. And one would get to that on a non-motion to dismiss basis earlier than -- if the motion to dismiss is denied on a -- on a summary judgment.

MR. FAIL: That's what's teed up for the omnibus objection, legal matter only.

THE COURT: Right.

MR. FAIL: You know, applying the facts that aren't disputed.

THE COURT: All right. So it seems to me that the -- the deadline to answer should be shorter enough, so that I could have a hearing on those 2 claims, on the 23rd, the same time as I could have a hearing on the drop ship issue. Although, if parties are in discussions -- most parties are in discussions, I would adjourn that, even if one party wanted to go ahead, because it just doesn't make sense to force all the other parties to drop meaningful settlement discussions, because one party doesn't want to.

MR. FAIL: Does that leave time for a motion to dismiss or whatever we'd be filing, with respect to that issue?

MS. CROZIER: It does.

MR. FAIL: Okay.

MS. CROZIER: So, with the hearing on March 23rd, would Your Honor propose a deadline to respond of March 9th?

THE COURT: To respond to the motion to dismiss?

MS. CROZIER: Correct.

THE COURT: Well, so when would you file the motion to dismiss?

No, I -- I think it could be seven. The response to the motion to dismiss could e seven days before the hearing.

MS. CROZIER: Okay.

THE COURT: So that would be the 16th.

MS. CROZIER: So the response would be the 16th?

THE COURT: Right.

MS. CROZIER: So the debtors would file the motion to dismiss --

THE COURT: On the 2nd?

MS. CROZIER: On the 2nd.

THE COURT: Okay, that makes sense

MS. CROZIER: And, to be clear, Your Honor, we would not be moving to dismiss, with respect to Counts 1 and 3, which are the breach of contracts and unjust enrichment claims.

THE COURT: No, those are already -- those are

already at issue, and -- and, as far as the last contract -- I'm sorry -- the last cause of action, that would only be -- oh, I'm sorry. Let's back up. The conversion cause of action, which is the next to last. Now, that's only premised upon the trust counts. Otherwise, it doesn't -- it's not really a claim.

MR. FAIL: So it's not incremental. We can -- can we skip that, for the responses, in other words?

THE COURT: Yes. And then the last cause of action which I -- I ignored, which is Count 6, which is fraudulent or negligent misrepresentation -- again, that's subsumed within the claim issues. So the only thing that's live in the complaint are Counts 2 and 4, and, to the extent they give a predicate to the next-to-last-count conversion, but it's really 2 and 4.

MS. CROZIER: Understood. We can certainly do that, Your Honor.

THE COURT: Okay, all right. So motion to dismiss or answer on those counts by the 2nd. If it's a motion to dismiss, the time to respond is the 16th, and then, unless I adjourn it, the hearing would be on the -- at the same time as the hearing on the drop box issue on the 23rd.

MR. FAIL: Thank you, Your Honor.

THE COURT: Although, again, everyone should understand that, if, you know, a number of parties who had

reserved the right to argue the drop box issue on the 23rd have said, no, we're in discussions, we don't want to do that, I'm not going to shortchange those -- or short-circuit those discussions by having one party go ahead.

MR. FAIL: Understood, Your Honor.

THE COURT: On the 23rd.

MR. FAIL: Appreciate that.

Unless Your Honor has any other questions, that concludes the debtors' report on the claims process.

THE COURT: Okay, all right. I think that concludes the pretrial also.

MS. CROZIER: Thank you so much, Your Honor.

THE COURT: Okay.

MS. CROZIER: And I have another proceeding to attend, if I may?

THE COURT: That's fine.

MS. CROZIER: Thank you.

THE COURT: All right.

If you want to memorialize this in a pretrial order, you can. The record's pretty clear, so I'm not sure you need to.

MR. FAIL: I think -- I think we'll rely on the record, Your Honor.

THE COURT: Okay, okay.

MR. FAIL: One other things, on the claims

process. The administrative -- the -- the representative of the -- of the creditors -- that process is still ongoing. My understanding is that the parties are conducting interviews and hope to have a person nominated or appointed within the first week of March.

THE COURT: Okay. In the meantime, all this is going on, and no one seems to be --

MR. FAIL: We're making progress, Your Honor.

THE COURT: All right, fine.

MR. FAIL: We've been working with the Creditors' Committee and the -- the Debtors' Restructuring Committee advisers to -- on each of the steps along the way.

THE COURT: Okay.

MR. FAIL: Okay.

THE COURT: When you say the Creditors' Committee, does that include the committee of the admin. parties under this?

MR. FAIL: Yes, Your Honor.

THE COURT: Okay.

MR. FAIL: But separately. So the Unsecured Creditors Committee both parties --

THE COURT: Both -- both groups? Okay.

MR. FAIL: We're in lockstep, Your Honor.

THE COURT: Okay, fine.

MR. LABOV: Good morning, Your Honor. Paul Labov,

Foley & Lardner, on behalf of the priority claim consortium. We've been working with the debtors, with respect to the admin. claim representative.

THE COURT: Right.

MR. LABOV: Over 380 -- you heard all the numbers this morning. I won't go through them all. Over 380 some-odd emails went out to the initial distribution list, in order to come up with names for that list.

THE COURT: Okay.

MR. LABOV: Got about a dozen or so. They've been whittled down and getting everybody onboard, and March 3rd, I believe, would be the interviews for that process.

THE COURT: But, in the meantime, as to the process for negotiating claims and resolving them, your -- your group's been involved, as well as the unsecured committee?

MR. LABOV: That's correct, Your Honor. We've been getting emails and daily briefings. Or not daily, but weekly briefings from Mr. Fail on these issues, including some of the -- the legal issues that he just discussed.

THE COURT: Okay, okay, thanks.

MR. FAIL: Your Honor, we can go through the next two items on the agenda, I think, hopefully, briefly.

THE COURT: Okay.

MR. FAIL: Item 3 is the debtors' first omnibus

objection to claims. Your Honor, we carried this objection for some time now, and we're moving forward today with respect to six claims, for which no response was received, no formal objection was filed, and there's no objection p[ending. We gave time for parties to consider due diligence and respond to us and come back to us, and there is no objection. So, unless there's any --

THE COURT: Okay, that's -- that's Nalco Company (ph), International Packaging Supplies, and Sherwin Williams Paint?

MR. FAIL: That's right, Your Honor.

THE COURT: Okay, all right.

Is anyone here on behalf of any of those claimants?

Okay, I will grant the omnibus objection, as to those claims. Nalco has four. International Packaging has one, and Sherwin Williams has one. The omnibus objection shifted any presumption underlying the proofs of claim back on to the claimant, and the claimant's obviously, have not carried their burden, in that they haven't responded. That the reason for the proposed disallowance is clear. It was either satisfied or released in connection with the assumption and assignment to Transform.

So you can email that order to chambers.

MR. FAIL: Thanks, Your Honor.

Item 4 on the agenda is now uncontested. It's a motion of the debtors requesting a release of the adequate assurance deposit amounts, pursuant to the adequate assurance procedures. So Your Honor will recall, we entered an order as like first day, second-day relief, setting up deposits. The debtors have worked tirelessly with Transform and outside third-party vendors to terminate utility accounts for locations that have been rejected.

The result is that substantial amounts of money can be released. No party in interest has objected to this relief. Notice was provided to all of the affected utility providers.

THE COURT: Okay. How -- that's fine, and -- and you can submit that order.

MR. FAIL: Thank you.

THE COURT: But I do have a question. How does this tie into the adjourned matter, which is the motion of certain utility companies to determine adequate assurance? Is that a separate -- I mean, is that truly a separate thing, or is that sort of wrapped up as part of this?

MR. FAIL: Your Honor, that was, I think, pending, since maybe day two of the case.

THE COURT: Right.

MR. FAIL: That's on there to keep -- I don't know why that continues there.

THE COURT: Okay.
MR. FAIL: But -- but, you know, there --
THE COURT: There's a separate one --
MR. FAIL: I'm not going to speak for that attorney and for those clients. Those -- those matters have largely probably -- that's probably outdated, but the clients want to continue to have it outstanding.
THE COURT: All right.
MR. FAIL: So we're --
THE COURT: All right. I mean, if -- are they the same folks --
MR. FAIL: -- continuing --
THE COURT: -- that have not contested the release of adequate assurance, that I just granted?
MR. FAIL: Related -- related people, with respect to certain accounts.
THE COURT: All right.
MR. FAIL: There are a lot of accounts with a lot of the same parties.
THE COURT: All right. Well, I guess, as long as they keep adjourning it, that's fine, but it doesn't -- you know, you might ask them to --
MR. FAIL: Taking my colleague --
THE COURT: Once the order is entered on the --
MR. FAIL: It's final, with respect to these --

oh, I understand. The language that we put in -- in -- we added some -- we're going to add some language to the order, with respect to one of the parties, Your Honor, to make sure that we're saving money in the account for -- for -- for that party.

THE COURT: Okay.

MR. FAIL: So there was one.

THE COURT: All right.

MR. FAIL: And then there's -- there's other motions that continue to be carried from month to month to month to month.

THE COURT: Okay.

MR. FAIL: If you have any specific questions, my colleague, Angeline Hwang, can -- can -- can explain.

THE COURT: No, that's okay.

MR. FAIL: I don't -- okay.

THE COURT: I just -- there's clearly not an easy answer to it. So that's all I wanted, at this point.

It just seemed to me the two motions were inconsistent with each other, and since I've granted the one --

MR. FAIL: There are many, many other accounts that are still -- for which we're still reserving --

THE COURT: Still working on?

MR. FAIL: Yeah.

THE COURT: Utility --

MR. FAIL: It takes time to, apparently, get them closed --

THE COURT: Get the deposits back.

MR. FAIL: -- or transferred.

THE COURT: Okay, all right.

MR. FAIL: Thank you, Your Honor.

So the next item is a contested one, and I'll turn it over to the movant's counsel.

THE COURT: Okay.

MR. FAIL: Thank you, Your Honor.

MS. COLON: Good morning, Your Honor. Sonia Colon and Gustavo Chico, on behalf of Santa Rosa Mall, LLC, and we also have Carlos Rios, appearing by Court Call, on behalf of Santa Rosa.

THE COURT: Okay, good morning.

MS. COLON: The crux of the matter is that an indemnity clause included in a settlement agreement between the debtors and the underwriters, which was not subject to the procedural requirements of Bankruptcy Rule 1919, is not enforceable and shall not be used as a justification to expand the automatic stay to non-debtors' third parties, thus depriving a claimant of estate rights to file an action against the underwriters and not the debtors for the loss suffered on the insured property in 2017.

THE COURT: Well, could I -- I've read the parties' pleadings on this, and I just have some basic questions that I want to go through first. I understand that the confidential settlement and release agreement, which is no longer confidential, --

MS. COLON: Correct.

THE COURT: -- has 2 provisions in it that arguably could give rise to claims against the debtors, paragraphs 5 and 6. Essentially, the debtors settled with the underwriters for a total payment in respect of the hurricane Irma and Hurricane Maria claims under the policies and that obviously, the underwriters did not want to pay twice, and so, the debtors agreed to indemnify them to hold harmless and indemnify and defend, the releasees, which are the underwriters, from any and all actions, demands, and claims under the policies, which releasor or any mortgagee, co-owner, or co-insured, additional insured, and/or loss payee, assignee, or subrugee, releasor, or any other person, including, but not limited to, owners and/or landlords or any of releasor's properties may assert at a later date arising out of the matters herein released.

And I know -- I know that Santa Rosa contends that, that the agreement as a whole, is of no force or effect, because it wasn't approved by the Court, and secondly, that that isn't the case, that the provisions on

which the debtor is pointing to as the potential harm to the debtor of lifting the stay or declaring that the stay doesn't apply, can be severed, but I have a, I guess, a more fundamental issue, set of questions. The stay was lifted already in this case, consensually, to let Santa Rosa proceed against the broker, correct?

MS. COLON: Aon.

THE COURT: Aon? But not as to the underwriters or the debtor, and there's a -- there's a history to this. There's clearly been a number of motions, as well as an adversary proceeding filed by Santa Rosa, seeking one form of relief or another, either lifting the stay, declaring the stay not in effect, declaring the insurance proceeds not property of the debtors' estate, et cetera, that have been withdrawn without prejudice, but I have a history from that, and my understanding, from that history, I just want to lay out here and see if there's any disagreement with it. The insurance -- I'm sorry. Let's back up.

The lease has a contractual requirement that Santa Rosa be listed in the applicable policy as an insured, arguably. That's what you contend.

The debtors say, no, that just simply any insurance proceeds recovered be issued jointly to the debtors, but in any event, that's 6.03(b)(3), and -- of the lease, but that's a contractual provision between the

debtors -- or the debtor -- and Santa Rosa Mall or its predecessors, right?

And then, however, the policies themselves don't name insured, right? And they don't -- nor do they name Santa Rosa as a loss payee. I'm talking about the policies themselves now. Is that -- that's correct?

MS. COLON: Your Honor, when you turn to the policy as such, there is language therein that it is covered, and I'm going to go to Docket 63172, and this is page 4. And may I read from this section? It says, "The Sears Holding Corporations or any subsidiary --" it don't sound (ph) -- "organization, partnership, joint venture, joint lease, or joint operating agreement is now and herein after constituted or acquire as a respect interest may appear and any other party for which the insured has the responsibility for providing insurances as the respective interest may appear." That's the named insured. With us is Carlos Rios, who's the expert on insurers and insuring, but the -- as a result of that language, --

THE COURT: So how do their interests appear? How do Santa Rosa's interests appear, under that language?

MR. RIOS: May I address the Court, Your Honor?

THE COURT: It's in the policy --

MS. COLON: Your Honor, may Carlos Rios address this issue?

THE COURT: Sure, yeah, that's fine.

MR. RIOS: Yes, yes, my name is Carlos Rios, and I'm sorry I -- I was not able to arrive in time to be at the hearing, and, Your Honor, the issue here is rather simple, even though it might look complicated. The policies itselves names as additional insured any person that Sears was obligated to insure. The contract between Sears and Santa Rosa provided that Sears had to insure the property. Furthermore, in order that the -- it agreed -- it obligated Sears to provide Santa Rosa with certificates of property insurance, on a yearly basis, and accordingly, Aon was authorized, pursuant to the insurance policy itself, to issue those certificates, and every year, Aon would issue a certificate stating that Santa Rosa and others were loss payees under the policy. So really, the insurance policy itself has the authority granted to Aon, who acted as a broker for Sears, but also as an agent for the underwriters evidences that Santa Rosa was a named insured or loss payee under the policy.

THE COURT: But the -- the -- the contract, the lease doesn't provide for Santa Rosa to be a named insured, correct? It just provides that the --

MR. RIOS: Well, --

THE COURT: -- the insurance proceeds be paid over to Santa Rosa.

MR. RIOS: That is true. The latter part is true.

THE COURT: Okay.

MR. RIOS: And --

THE COURT: So, as their interests may appear to me -- I'm going through this, because I have always understood, having heard this before in prior hearings and looked at the policies and the lease agreement, that it may well be that Santa Rosa has a cause of action against Aon, because of the certificates, but I'm having a hard time seeing how it has a cause of action against the underwriters, and this is relevant, because in weighing the balance under the case law, whether it's Queenie v. Nygard or Sonnax, the harm to the parties is important. And if litigation is going to be initiated in Puerto Rico against the underwriters that, to me, has very little chance of succeeding, but that the Debtors would have to defend, that obviously weighs in favor of the Debtors' position.

I have another question. And this is an area that was hardly briefed at all. The motion refers to 26 LPRA Section 2003(1), which states, "Any individual sustaining damages and losses shall have at his option a direct action against the insurer under the terms and limitations of the policy, which action he may exercise against the insurer only, or against the insurer and the insured jointly."

Now, the case cited Marina Aguila v. Den Caribbean

Inc., 490 F. Supp. 2d 240, 245 (DPR 2007), merely refers to that section. It doesn't construe it or apply it. And in neither the motion, or the objection, or the reply is there any real discussion of how this statute works. But just looking at its plain language, which refers to a direct action under the terms and limitations of the policy, and construing it based on my limited Spanish, because the only opinions I could find were in Spanish, it isn't, to me, what I normally think of as a direct action statute, which lets a third party sue an insurer even if the policy itself doesn't list them as a named insured or a loss payee. And there are such statutes, usually in the personal injury realm.

It appears to me that this is one where there is a lawsuit under the terms of the policy. And if the policy itself doesn't name the plaintiff, Santa Rosa, in any way, except as we have just gone through, again I'm not sure that this really helps Santa Rosa's cause. On the other hand, if it truly is a direct action statute and not under the policy, then it would seem to me that the indemnity doesn't apply, because the indemnity is under the policy. So I don't know if either side has any thoughts on that.

I mean, I have no problem, and I don't believe the Debtors do either, in lifting the stay or saying the stay doesn't apply as to a true direct action statute where the insurer is being sued, not under the policy, but under the

statute. But this language doesn't really seem to provide for that, this statutory language. So I don't know if people have thoughts on that. If they don't, I'd like them to brief it.

MS. COLON: Your Honor, I have to --

MR. RIOS: Could I address the Court on that issue, Your Honor?

THE COURT: Yes.

MR. RIOS: Quickly.

THE COURT: Sure.

MR. RIOS: Okay. You're right in the sense that the -- it's a statute directed to liability issues. But in this case, if we have based our arguments on what I said previously, the policy itself has a blanket name insured, which is described as those persons or those entities that Sears is obligated to insure. Sears was obligated to insure Santa Rosa. And accordingly --

THE COURT: Does it -- well, how was Sears obligated to insure Santa Rosa? I see that it was obligated to pay proceeds of insurance to Santa Rosa, but I don't see how it was obligated to insure Santa Rosa, for example by naming it as a loss payee or named insured.

MS. COLON: Your Honor, Section 6 --

MR. RIOS: Your Honor, the thing here is that the certificate of insurance --

THE COURT: Yeah, but that's a separate issue. The certificate of insurance is why the stay was lifted as to Aon. Aon may have -- may -- I'm not saying it did, but it may have, in issuing those certificates, given rise to a cause of action that Santa Rosa has, and the stay has been lifted so that you can go against Aon. I'm focusing on -- I'm not focusing on their certificates, because the certificates is a separate thing.

MS. COLON: Your Honor, I'm going to go and supplement with Mr. Rios for a second.

THE COURT: Okay.

MS. COLON: I know there's two issues that I want to clarify. We're trying to set aside one clause, not the entire agreement, but one clause, which is Section 6, which is the one of the indemnity. And later, I want to put, I think --

THE COURT: No, no. I --

MS. COLON: Second, the lease had --

THE COURT: I'm focusing on what's actually at issue in the lawsuit you want to bring.

MS. COLON: The lease agreement in -- I call your attention to the lease agreement, Section 6.02. That's where the insurance obligations come from.

THE COURT: And the parties briefed this in motion number two, I think, which was withdrawn and never decided

by me. But at the hearing, I said you're going to have to show me something more than you showed me then, which was the lease agreement.

MS. COLON: But the lease -- you're asking that the lease agreement --

THE COURT: Right.

MS. COLON: -- does not provide for a requirement to place in insurance, but --

THE COURT: No. There's a requirement to place insurance.

MS. COLON: Yes.

THE COURT: The issue is whether it is insurance where Santa Rosa is to be a named insured or a loss payee, or whether Santa Rosa was content in the lease agreement to rely on the covenant in 6.03 that Sears would turn over the proceeds to it.

MS. COLON: Well, the lease agreement provides coverage to the insurance. And then the insurance covers most --

THE COURT: All right. You're not really --

MS. COLON: Okay.

THE COURT: Does it provide this -- 6.02, does it provide that in addition to obtaining coverage for the mall, you know, for the building, that that coverage be jointly in the names of Sears and Santa Rosa Mall, or that Santa Rosa

Mall be named as a loss payee?

MS. COLON: Well, there's language regarding here loss payable clauses to the landlord, but I have to find that there is language also in this lease agreement in which the money has to be placed in an account in the name of Santa Rosa.

THE COURT: Yeah. That's 6.03, but that's a contract. That's not -- that's the contract between Sears, as tenant, and Santa Rosa, as landlord. It doesn't have anything to do with the insurance policy being something that the landlord has an interest in. It's a separate distinction.

And the parties dealt with this in a motion before me. We had a hearing on it. I prepared on it about six months ago. And I told you then, you didn't lay out enough for me to show that this argument held water. I said I can adjourn this, and you can come up with it, but I didn't believe there was enough. And instead, the motion was withdrawn without prejudice. And so here we are again. It's the same issue and I'm at the same place.

MR. RIOS: Your Honor --

THE COURT: I don't see, in other words, why A) there is, in fact, a claim against the underwriters, either under general law or under this statute. And that weighs heavily in my mind as to whether I should say that the stay

should be lifted when the Debtors have already gotten the money, and in return for getting the money, have represented and indemnified the underwriters that this is it. They're not going to have to pay twice.

So I just -- this seems to me to be a litigation that's going nowhere and, therefore, I don't know why I should let it go nowhere, because it would just be a waste of time and money.

MR. RIOS: Your Honor, can I address the Court? I'd like to differ, Your Honor.

THE COURT: Okay.

MR. RIOS: This is Carlos Rios.

Your Honor, the problem that we have here is that Aon acted as an agent for the underwriters. So what Aon did, when Aon certified that the Santa Rosa was a loss payee, Aon was acting on behalf of the underwriter, under the authority provided under the insurance contract. So it's definitely a responsibility of the insurance company.

And this happens every time there is a mortgagee or a lessor. If they're left out, the insurance company pays to the debtor or to the insured, in this case Sears, without the knowledge of the lessor or the mortgagor, this is what happens. They have to pay twice.

Furthermore, Your Honor, we sustain that Sears, if at one time had a leasehold -- an insurable interest in the

property, it has no insurable interest now, because it rejected the lease.

THE COURT: But it's gotten the money. I believe it's been paid the money, right? So it doesn't really matter whether it has an insurable interest today. It had one when the hurricane happened, and it's gotten the money.

But can I do back to the first point? I really didn't understand that the claim that you want to bring against the underwriters is somehow that Aon was acting as their agent in giving a false certificate to Santa Rosa. It seemed to me the claim that you wanted to bring against the underwriters is that Santa Rosa is entitled to the insurance, separate and apart from what Aon represented in the certificate. That the policies themselves are what give rise to the claim against the underwriters. And that's consistent with the reference, I believe, to 26 LPRA 2003(1).

It's a -- I think what you want to -- I clearly took away from these pleadings that you want to sue the underwriters separately and independent from Aon, and not based on the certificate, but based on their having an obligation of their own under the policies to pay Santa Rosa, or not to pay the Debtor. And I just -- I'm having a hard time seeing that. Their contract is their policy.

MR. RIOS: Your Honor, I'm basing my arguments on

the insurance contract. Exactly, on the insurance company, the fact that Aon might not have had authority to issue those certificates is a different issue. They did issue and they are barred to deny that the issue -- that the certificates have no viability.

So we -- that's why we asked to sue Aon, but we never waived our right to sue the underwriters.

THE COURT: I know you haven't waived the right, but I don't see that you have the right. To me, it seems like a strike suit, and it will bring in primarily -- the effect will be on the Debtor because of the cost, because you are suing under the policies.

If you were suing on some other basis than under the policies, then I don't think the indemnification applies. But if you're suing under the policies, which I don't think you have a claim for, then the indemnification applies.

MR. RIOS: Your Honor, I have another argument with regards to the indemnification. It has to -- the argument was presented in our brief and is based on the fact that no one should be able to benefit or profit from its own wrongdoing. When Sears represented in the settlement that no party had an interest in the insurance proceeds, they misrepresented that fact.

THE COURT: Well, I don't agree with that.

There's no lien granted. So the interest is contractual, which isn't an interest. It's just a contract. And Santa Rosa has a claim against Sears for that.

MR. RIOS: But we have a claim against the insurance company based on my previous arguments.

THE COURT: But those aren't persuasive to me. My inclination is to have the parties brief this. Let me back -- let me go at it a different way. The Debtors contend, I think correctly, under Queenie v. Nygard, and Sonnax, and Lomas, and the case law, that paragraphs five and six of the insurance settlement mean that the stay either applies here or should be extended.

And again, I believe that is correct. But that requires one to look at those provisions. What did the Debtors, in fact, indemnify the underwriters for? And again, it's -- any and all actions, demands, and claims under the policies.

So if you're making a demand in the litigation you want to bring against the underwriters, under the policies, this indemnification applies. It equally doesn't apply if you're bringing a claim or demand against the underwriters on some other basis, i.e. you're the principal and responsible, ultimately, for Aon's false certificate. But as far as the policies are concerned, I don't see it.

Now, the parties haven't really briefed this. One

party, the Debtor, attached their briefing from the last time we were here on this issue, and that's about it. I'm happy to give you a little more time to brief that, but I just don't see it. I don't see the language that ties up to give Santa Rosa a claim under the policies, as opposed to in respect of the certificate -- the insurance certificate.

So I'm happy to give you more time to brief that issue and to explain what I think is the case that the statute doesn't change that, because you still are bringing the claim, as far as the statute is concerned, the Puerto Rican statute, under the policies.

And if it's under the policies, right now, as I said six months ago, I'm in the same position today, I don't see how there is a claim under the policies. At best, there's a claim because there was a certificate provided that wasn't accurate.

MR. RIOS: Well, I mean, no one has said that the certificate is not accurate. No one has said that Aon was not acting as an agent of the insurer.

THE COURT: But in respect to their certificate.

MR. RIOS: The certificate has value, Your Honor. And there's --

THE COURT: That's why you have a claim against Aon. And maybe through Aon against the underwriters, but not under the policy.

MR. RIOS: Look, again, I repeat, Your Honor, no one has questioned the legality or the validity of those certificates.

THE COURT: Well, I do. It's just not true. It's not true. It's on its face. I don't think anyone needs to question. If it were true, we wouldn't be fighting over this.

MR. RIOS: Your Honor, that's why we -- if we have to brief it, we'll brief it, of course. But two steps. One step is that the certificates validates the policy or test that it's obligated to insure anyone (indiscern.).

THE COURT: Well, that's what has never been briefed to me. If you guys have cases that show that, that a certificate controls and changes the terms of the policy, then you can brief that. The Debtors briefed it. I read their case. It does seem to stand for the proposition that the policy controls and not the certificate. That doesn't mean that you might not have a cause of action against the entity that issued the certificate and maybe against their principal based on the certificate, not on the insurance.

And again, the indemnification here is in respect of the -- under the policies. That's what they settled, not that they gave a false certificated. They didn't settle that.

MR. RIOS: Your Honor, we're not saying -- we're

not in disagreement with what you just said. The policy is the one that responds. The certificate is just every --

THE COURT: Well, so I'm going to adjourn this to give Santa Rosa Mall the time to brief that issue, i.e. whether a certificate overrides a policy.

MR. RIOS: We're not saying that, Your Honor. We're not saying that it overrides. We're saying that everything is -- the existence of the policy and the policy itself says that it's obligated to insure that entities like Santa Rosa, and Santa Rosa is the one --

THE COURT: Well, you could brief that issue too. But you could take me through the plain language of the policy and the lease agreement, and try to show me that there actually -- that the language that has been quoted to me from the policy actually creates a right in the insurance, as opposed to the proceeds of the insurance, in the insurance itself by Santa Rosa, or of Santa Rosa.

MS. MARCUS: Your Honor, Jacqueline Marcus from Weil Gotshal on behalf of the Debtors.

May I be heard on just a couple of points?

THE COURT: Yes. But so, I'm not prepared to grant this motion until I see that brief. Now, maybe Ms. Marcus could persuade me that I should never grant the motion, but I just -- to me, again, it's just -- well, I quoted Yogi Berra two days in a row. This is déjà vu all

over again. We dealt with this six months ago, except you guys didn't deal with it. I said, you had to show me more, and this pleading doesn't show me more on this issue. And it's the gatekeeping issue.

Again, if you want to proceed against the insurers, separate and apart from under the policies, then I don't think there's a -- that's like the Aon situation. The stay should be lifted. But I don't think that's what you want to do. You want to proceed under the policies. That raises the issue as to whether that's just a non-starter, which has only the effect of causing the Debtors to pay a lot of money to yet again brief the issue, which they've already done.

It just doesn't -- it's not worth it to anyone to do that under the law. It's just not consistent, subject to your persuading me that you actually have -- would have a right against them. Then that's a different weighing of the factors.

MS. COLON: It is our position that the insurance, combined with the --

THE COURT: No. I know it's your position. I understand.

MS. COLON: We'll brief on that.

THE COURT: Okay.

MS. COLON: But that goes into that there's --

that the settlement agreement was valid as such.

THE COURT: Right.

MS. COLON: But it did not comply with 9019. Again --

THE COURT: But 9019 is a bankruptcy rule. Bankruptcy rules cannot create greater rights than exist under the Bankruptcy Code. So you have in the Bankruptcy Code in Section 363 two provisions: one, 363(c) says the debtor can take actions in the ordinary course without Court approval; and then secondly in 363(b), a debtor must take an action out of the ordinary course only with notice and an opportunity for a hearing.

So the issue there is is this agreement out of the ordinary course. There's a separate issue over on top of that which is even if I assumed it was out of the ordinary course, no one has really identified anything with regard to the agreement as to why it's not a proper exercise of business judgment. Is the amount wrong? I mean, did they settle for less than they should have?

MS. COLON: Your Honor, the fact is that this is not whether they settle for the amount or the amount (indiscernible), I said is that there's a $46 million settlement for 40 stores at the same time in a catastrophic category 5 hurricane, which does not compare to the other ones in damages.

THE COURT: Well --

MS. COLON: This is out of the ordinary --

THE COURT: No, no, but look, the reason I raised the first point I did first is in part for what I'm going to say next.

If the amount of the settlement is not the issue, and I don't believe it is the issue, the amount, the issue that Santa Rosa has with the settlement is that the money went to Sears, right, not to Santa Rosa? That goes to the first thing that we just spent the last ten minutes talking about is to whether that was improper or not. If it was improper, then retroactively, I wouldn't approve the settlement if it turns out to have been out of the ordinary course.

And probably, if there was a way around your client getting money that it had an absolute right to, then it wouldn't have been in the ordinary course. But if it's just a settlement of the dollars coming in under the policy, and there's no dispute about those dollars, it's just where it went, then it's a no brainer. Of course I would approve it retroactively.

So it all, to me, comes down to the first issue, which is again, does Santa Rosa vis-à-vis the insurers have a separate right to get that money, as opposed to the Debtors?

MS. COLON: And we'll brief. It's our position we consider it that we did, and that this is different from previous occasions, because we were going against the funds of the Debtor. Now, we are going against the underwriters, as such.

THE COURT: But in each case, it's the same money. It's the same money. Okay. So I think I've heard enough on this point.

MS. MARCUS: Jacqueline Marcus, again, Your Honor. Weil, Gotshal & Manges on behalf of the Debtors.

Just a few very brief points. With respect to Santa Rosa's argument that the language of the policy that says, "Any other party for which the insured has responsibility for providing insurance applies to the landlord. The Debtors dispute that that's what that language means. And in fact, Santa Rosa has acknowledged before the Court, actually almost exactly a year ago, that Santa Rosa was neither a loss payee or a beneficiary of the policy.

I think that ship as sailed and we shouldn't revisit that again. With respect to the Puerto Rico statute, Your Honor, you're exactly right. It does say under the terms and limits of the policy, and I just wanted to note for the Court that Section 53 of the policy

specifically says that the insurers are only obligated to pay Sears Holdings Corporation or in accordance with the direction of Sears Holdings Corporation. And that goes to the merits of any claim against the insurers under the policy.

THE COURT: All right. So Santa Rosa should address that paragraph in its brief.

MS. MARCUS: And finally, Your Honor, the certificate of insurance specifically says -- bear with me one second -- "The insurance afforded by the policies described herein is subject to all the terms, exclusions, and conditions of such policies. Such policies, limits shown may have been reduced through paid claims."

Your Honor, I know you've said that you were going to give Santa Rosa more time to brief the issue. We have spent so much time and effort on this over the past --

THE COURT: I'm not asking you all to brief it.

MS. MARCUS: Okay.

THE COURT: I'm not asking you all to brief if. I think that -- I appreciate that it's been frustrating given that we're now on the sixth time that these issues have been raised with the Court. At the same time, however, each time Santa Rosa has withdrawn without prejudice. Ostensibly, I think because of negotiations. I don't think the last stipulation limited their right to go against the

underwriters, it just said they weren't doing it at the time.

So I'd like to nail this down once and for all. They never really responded to your case law and interpretation several months ago.

MS. MARCUS: That's correct.

THE COURT: I don't -- I'm not sure they would be able to, but I'd like to give them a chance. And I would ask them -- I mean, I think the leading case on interpreting this statute, just based on the annotations, is General Accident Insurance Company P.R. v. Ramos, 148 DPR 523 (1999). It's in Spanish, however. So I think it says -- at least this is what the annotation says it says, the same thing that I believe the statute says, which is it's an action against the insurer under the terms and limitations of the policy, not just a regular direct action because you're the intended beneficiary.

If Santa Rosa wants to dispute that, they ought to give me the English translation of that case and other cases. But I think I heard from his counsel on the phone that it doesn't dispute that.

So, look I -- again, if you want to sue the insurers not under the policies, but for giving you a false certificate, I think the Debtors will see their way to lifting the stay on that, because I don't think the

indemnity applies to that. But if you want to sue them under the policies, I don't see it at this point. And I don't see -- I think the settlement agreement, in a way, the argument that it's out of the ordinary course doesn't matter because, again, the issue there is not the amount that they settle for, but the notion that somehow either the money shouldn't have come to Sears, it should have gone to Santa Rosa, or alternatively, that it's still owed, notwithstanding that the insurers have already paid it to Santa Rosa. And to me, that's just -- it's the same issue.

And I don't believe that when you weigh the Sonnax factors, the Debtors should be put to defending that issue yet again. On the other hand, if there is a -- their right against the insurers under the policies, that's a different set of facts to weigh. Those aren't, as far as I can see, before me today.

So I'll give you until the 13th of March to brief that issue and I'll adjourn this hearing until the 23rd, but just to cover that point. And if I conclude that the claim can be under the policies, then I'll have to reevaluate my analysis of the applicability of Sonnax and Queenie v. Nygard to that.

MS. MARCUS: Thank you, Your Honor.

THE COURT: Debtors don't have to file a reply, you know, unless they've left something out that's

absolutely critical and then you can point it out.

MS. MARCUS: Okay. Thank you, Your Honor. That brings us to the conclusion of our agenda for today. Doesn't it?

THE COURT: There had been an objection to the settlement procedures, the mediation procedures, but that was resolved, right?

MR. FAIL: It was adjourned, Your Honor. I think there was an issue with noticing, so I think we adjourned it to a later date.

THE COURT: Okay. Fine. On that score, I would hope that the mediators, given the -- if there's a claim that's pretty small, we'd do it telephonically or, you know, not force people to come to New York if it's like a $15,000 preference.

MR. FAIL: Sure. Your Honor, we -- I'm not as familiar as you are, but we'll make sure that we can do that.

THE COURT: I think that was the main issue.

MR. FAIL: Thank you, Your Honor.

THE COURT: Okay.

MS. MARCUS: Thank you.

(Whereupon, these proceedings were concluded at 11:48 AM)

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C E R T I F I C A T I O N

We, Pamela Skaw, Nicole Yawn, and Jamie Gallagher, certify that the foregoing transcript is a true and accurate record of the proceedings.

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